United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

77-7233

To be argued by
RICHARD BAKALOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77—7233

RALPH McKECHNIE,

Plaintiff,

—against—

BEACH HAVEN ASSOCIATES, INC., and
WORTHMAN HOUSING ASSOCIATES, INC.,

Defendants.

WORTHMAN HOUSING ASSOCIATES, INC.,

Third-Party Plaintiff-Appellant,

—against—

COLLYER ASSOCIATES, INC.,

Third-Party Defendant-Appellee.

APPELLEE'S BRIEF AND APPENDIX

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WORTHMAN HOUSING ASSOCIATES, INC.,

Third-Party Plaintiff-Appellant,

—against—

COLLYER ASSOCIATES, INC.,

Third-Party Defendant-Appellee.

APPELLEE'S BRIEF

Counterstatement of Nature of Case and Facts

It is conceded by both parties to this appeal, or is at least the law of the case, that on December 18, 1972, the plaintiff was injured when he somehow fell from a plywood working platform or scaffold (hereafter referred to as a "scaffold"), which scaffold was supported by the steel frame work of a rear canopy of a building under construction in New Rochelle, New York. It is also conceded and is also the law of the case, as the jury so found, that the accident occurred due to the inadequacy of the plywood scaffolding (120a*).

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*Numbers followed by "a" in parentheses refer to page numbers in appendix.

The scaffolding had been constructed approximately three weeks prior to the accident by laborers employed and directed by the general contractor (hereafter referred to as "Worthman") (141a, 144a, 146a, 147a). The scaffolding was originally constructed by the contractor so that the brick sub-contractor could do its work (144a). Prior to the accident, the scaffolding was used by the brick sub-contractor (144a), as well as other sub-contractors (141a, 149a) and employees of the contractor (145a).

On the day of the accident, the plaintiff, an employee of Collyer Associates, Inc., the ornamental iron sub-contractor on the job (hereafter referred to as "Collyer") had finished his work for the day, when the contractor's superintendent told him that he should start the ornamental iron work on the rear canopy (147a, 148a). The plaintiff told the contractor's superintendent that, to do the work on the rear canopy that day, he would have to work from the contractor's scaffolding. Under the circumstances herein, such a statement by the plaintiff could in no way be considered unusual, since the ornamental iron workers could not be expected to remove the contractor's scaffolding and put up their own scaffolding in its place and stead (141a). The plaintiff, because of necessity, or under the requirements of reasonable convenience, had to use the contractor's scaffolding in order to do his work on the rear canopy. In any event, the contractor's superintendent helped the plaintiff obtain ladders to enable the plaintiff to get on to the contractor's scaffolding (148a, 149a) and told the plaintiff that he could work off the contractor's scaffolding (159a). Thus, the jury's finding that the contractor's scaffolding was used by the plaintiff at the direction of, or with the permission of, the contractor (120a) was certainly supported by the evidence.

The contract between the contractor and the sub-contractor, Collyer, plaintiff's employer, anticipated the precise circumstances that occurred in the case at bar.

The contract provided that, though the sub-contractor should ordinarily provide its own tools and equipment to do its own work (Article 2 of the Contract, 123a), the sub-contractor, with the permission of the contractor, could instead use the contractor's equipment to do the sub-contractor's work (Article 11.11 of the Contract, 130a).

Thus, the contractor, pursuant to the contract, agreed to have the sub-contractor do its work from the contractor's scaffolding, which scaffolding had already been constructed and put into place by the contractor for the use of various trades. When it turned out that an accident occurred to the plaintiff due to the inadequacy of the contractor's own scaffolding, the contractor then attempted to obtain contractual indemnity from the sub-contractor, Collyer, plaintiff's employer.

The contract with Collyer, however, made it clear that Collyer only had to indemnify the contractor for damages suffered by the contractor, if the damages had been caused by Collyer's negligent act or omission. The testimony showed that the manner in which the scaffolding was constructed and placed certainly seemed to be safe (149a-158a). In fact, the plaintiff himself, prior to going on to the scaffolding, thought the scaffolding was safe (156a) and could not conceive how an accident could occur (158a). Even five years after the accident, the plaintiff could still not conceive how the accident had occurred (159a). Thus, the jury was absolutely entitled to find, as it did, that the accident occurred due to the inadequate scaffolding provided by the contractor, but not due to any negligence on the part of Collyer, for failing to provide its employees with safe scaffolding for their work on the canopy (120a), since Collyer neither knew nor should have known that the scaffolding provided by the contractor was inadequate.

Once the jury specifically found that Collyer had not been negligent in failing to provide its employee's with safe scaffolding for their work on the canopy, all grounds

for indemnity fell and the trial court had no choice but to then dismiss the third-party complaint against Collyer.

In Worthman's statement of the nature of the case, Worthman, on pages 4 and 5 of its brief refers to *Rocha* v. *The State of New York*, 77 Misc. 2d 290, 352 N. Y. S. 2d 990, affd. 45 A. D. 2d 633, 360 N. Y. S. 2d 484 (3rd Dept.), leave to appeal denied 36 N. Y. 2d 642 (1975), and *Kelly* v. *Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 N. Y. 2d 1 (1974). These cases hold that a contractor or owner can be found vicariously liable to a plaintiff under Section 240 of the Labor Law for the acts or omissions of its sub-contractors. However, these cases also make it clear that the contractor or owner can be found to be liable to a plaintiff, under Section 240 of the Labor Law, for their own acts. In the case at bar, the contractor was not held liable to the plaintiff due to any act or omission on the part of the plaintiff's employer, but rather the contractor was held liable to the plaintiff due to the fact that the contractor itself had supplied, for the plaintiff's use, inadequate scaffolding. Thus, any reference in appellant's brief, concerning the vicarious liability of an owner or contractor is completely inapplicable to the facts in the case at bar.

In Worthman's statement of the nature of the case, Worthman also indicates, on page 5 of its brief, that *Kelly, supra*, overruled the old New York cases, by allowing and even encouraging contractors, found liable under Section 240 of the Labor Law, to obtain contractual indemnity from their sub-contractors. This is a misreading of *Kelly, supra*, as it was pointed out in *Kelly, supra*, that a contractor found liable under Section 240 of the Labor Law always had the right to obtain contractual indemnity from its sub-contractor. There is no argument that the indemnity provisions, in the contract entered into with Collyer herein, could have been worded so as to compel Collyer to indemnify the contractor for injuries occurring to Collyer's employees, resulting from the performance of the sub-contract, even without negligence on

the part of Collyer. However, this was not the wording of the indemnity provisions of the sub-contract. As previously pointed out, the sub-contract only required indemnity if Collyer had been negligent. Since Collyer was found free of negligence by the jury, Collyer cannot be compelled to indemnify the contractor when the contractor provided inadequate scaffolding to Collyer's employees. In the case at bar, this Court is not faced with the question, whether indemnity provisions in contracts are favored or encouraged, but only faced with the question whether the indemnity provisions of the contract in question compels indemnity under the facts at bar. It is respectfully submitted that, since the indemnity provisions of the contract in question only compels indemnity if the sub-contractor is found negligent and since, in the case at bar, the sub-contractor was not found negligent, the trial court was correct in dismissing the third-party complaint against Collyer, plaintiff's employer.

In Worthman's statement of the nature of the case, Worthman, on pages 5 and 6 of its brief, argues that Judge Dooling only submitted to the jury the question whether the sub-contractor had committed a negligent act, while not allowing the jury to determine whether the sub-contractor had committed a negligent omission. This is a misstatement of fact. Judge Dooling posed both questions to the jury. In this regard, Judge Dooling charged:

> "As between Worthman and Collyer, Worthman must show that a negligent act or a negligent omission of Collyer or one of its employees was, in whole or in part, a cause of plaintiff's accident" (37a) . . .
>
> "Collyer undertook in its contract to hold Worthman harmless from all damages . . . if and only if the accidents were due in whole or part to negligent (sic) or omission on Collyer's part. In this respect, Collyer owed to its employees the duty to provide them with a safe place to work, and that would in-

clude providing proper scaffolding where needed to do the work. Collyer, acting through plaintiff and Falasca and their superiors, was under a duty to plaintiff to see to it that any necessary scaffolding was on the job and in use for the canopy part of the job whether provided by Worthman or Collyer itself. If, therefore, you find from the evidence that adequately safe scaffolding or other means of safely installing the fascia were not provided, and that was known to Collyer through the knowledge of its employees, including plaintiff, or should have been known to it, then that would constitute negligence or a negligent omission on Collyer's part and you must then find for Worthman on its claim over against Collyer" (37a, 38a).

It is thus obvious that the aforesaid contention by Worthman, that Judge Dooling did not submit to the jury any issue as to negligent omission on the part of the sub-contractor, has absolutely no merit. It is incomprehensible that Worthman would make such a claim, especially since Judge Dooling specifically had the jury answer the question, whether the sub-contractor was negligent in failing to provide safe scaffolding for the work on the canopy fascia (120a).

Worthman, in its statement of the nature of the case, at page 6 of its brief, claims that the lower court committed reversible error by ruling that Collyer did not have an underlying duty to provide proper scaffolding. However, the lower court made no such ruling. As set forth above, the lower court charged the jury that:

". . . Collyer owed to its employees the duty to provide them with a safe place to work, and that would include providing proper scaffolding where needed to do the work . . . and . . . was under a duty to plaintiff to see to it that any necessary scaffolding was on the job and in use for the canopy part of the job whether provided by Worthman or Collyer itself . . ." (37a, 38a).

Thus, the lower court certainly did not make any ruling, as claimed by Worthman, that Collyer did not have an underlying duty to provide safe scaffolding and the jury's determination that Collyer was not negligent as regards the scaffolding was supported by the evidence. Such jury determination is in no way questioned on appeal.

Worthman, in its statement of the nature of the case, at page 6 of its brief, claims that the lower court committed reversible error by overlooking the direct obligation running from the sub-contractor to the contractor, which obligation, according to Worthman, was negligently breached. In support of this contention, Worthman cites *Carinha* v. *Action Crane Corp.*, —— A. D. 2d ——, 396 N. Y. S. 2d 191 (1st Dept., 1977). *Carinha, supra,* is inapplicable to the case at bar for, in *Carinha, supra,* the contractor delegated its Section 240 Labor Law duty of safely placing and safely operating a crane to a sub-contractor, which sub-contractor then negligently placed and negligently operated the crane. The contractor in *Carinha, supra,* had nothing whatsoever to do with the placement or operation of the crane. Thus, in *Carinha, supra,* the contractor was held solely vicariously liable for the acts of its sub-contractor due to the sub-contractor's negligent performance of the duty delegated to it by contract. However, in the case at bar, the contractor created and, in fact, provided the scaffolding for the sub-contractor's work and the sub-contractor was specifically found not to have been in any way negligent as regards the scaffolding. Thus, as aforestated, *Carinha, supra,* is completely inapplicable to the case at bar.

The duty which Worthman claims the court below overlooked was Collyer's contractual duty to provide its own scaffolding. However, this duty was certainly modified when the contractor itself, pursuant to the terms of the same contract, provided the scaffolding for the use of Collyer's employees. It is respectfully submitted that, under such circumstances, it was the contractor who

breached a duty to Collyer by supplying defective scaffolding, rather than Collyer having breached a duty to the contractor as contended by Worthman.

It has been held by the New York Court of Appeals that, when a contractor allows an employee of a subcontractor to use unsafe scaffolding, provided by the contractor, the contractor breaches a duty, both to the injured workman and to the sub-contractor. The New York Court of Appeals in *Quigley* v. *Thatcher*, 207 N. Y. 66, 68, 69 (1912), stated:

> ". . . we think that a contractor may by course of events become liable to a subcontractor and his employees for the safety of a scaffold although originally and expressly he assumed no such responsibility.
>
> "Without attempting to forecast other illustrations of liability which might thus arise, we think that when a contractor constructs and so locates a scaffold or platform that his subcontractor must of necessity or under the requirements of reasonable convenience in the performance of his work use the same the contractor may be held to have anticipated such use and to have assumed liability to such subcontractor and his employees for the safety thereof . . ."

(See also *Galbraith* v. *John B. Pike & Son, Inc.*, 18 A. D. 2d 39, 238 N. Y. S. 2d 263, 4th Dept., 1963.)

Thus, in the case at bar, Collyer did not breach any duty to the contractor, but rather the contractor breached a duty to both the plaintiff and Collyer, by constructing and placing inadequate scaffolding on the canopy and then either, due to necessity or at least under the requirements of reasonable convenience, having the plaintiff use the inadequate scaffolding. As previously stated, the jury specifically found that Collyer had not been negligent in failing to provide safe scaffolding. Whether one calls the duty to provide safe scaffolding a duty owed to the

plaintiff or a duty owed to both the plaintiff and the contractor, the jury in any event determined that Collyer had not been negligent by failing to provide said scaffolding and, thus, had breached no duty to either the plaintiff or the contractor.

Worthman, in its statement of the nature of the case, at page 6 of its brief, also claims that the lower court incorrectly charged the jury as concerns the negligence aspect of the third-party action. It is respectfully submitted that this claim by Worthman also has no merit. The case at bar went to the jury on a proper charge for the jury to determine whether the third-party defendant sub-contractor was negligent in failing to provide safe scaffolding for its own employees. The jury properly determined this issue in the negative and, based on said determination, there are no grounds upon which to compel the sub-contractor to indemnify the contractor. It is thus respectfully submitted that the judgment of the court below should be affirmed.

POINT I

Since the sub-contract entered into by Collyer only requires Collyer to indemnify the contractor for damages caused by a negligent act or omission of Collyer, and since the jury properly found that Collyer was not negligent, the judgment in favor of Collyer in the third-party action should not be disturbed.

The indemnity provisions of Collyer's sub-contract are contained in Article 11.20 of the sub-contract (131a). Though in the appendix prepared by Worthman, a portion of Article 11.20 of the sub-contract is emphasized in large dark print, the pertinent provision of said article of the sub-contract, setting forth requirements needed to trigger Collyer's obligation to indemnify is not so emphasized. Such pertinent provision reads as follows:

> "The subcontractor shall indemnify and hold harmless the contractor . . . from and against all claims . . . caused in whole or in part by any negligent act or omission of the subcontractor . . ."

The New York courts have made it clear that such an indemnity provision only requires the sub-contractor to indemnify the contractor if the sub-contractor is found to be negligent. Since in the case at bar, the jury properly found Collyer not to be negligent, Collyer should not be required to indemnify the contractor.

In *Barthmare* v. *City of Long Beach*, 49 A. D. 2d 898, 375 N. Y. S. 2d 285 (2nd Dept., 1975), the Appellate Division, upon the decision of the lower court, affirmed the dismissal of a contractual claim for indemnity. The language of the indemnity provision involved in *Barthmare, supra,* required indemnification for injuries resulting "through any act or omission on the part of the subcontractor or his agents, employees or servants." The lower court, in interpreting this agreement and dismissing the third-party complaint stated at page 36a of the Record on Appeal in the Appellate Division:

> ". . . Basically, this is an agreement to indemnify Lane against S. & S. Concrete Corp.'s own acts of negligence. The intent manifested by this third clause is clear. S. & S. agreed thereby to indemnify Lane for any injuries attributable to the negligence of the S. & S. Concrete Corp."

Similarly in *Lopez* v. *Consolidated Edison Company of New York, Inc.*, 87 Misc. 2d 947, 387 N. Y. S. 2d 945, affd. 48 A. D. 2d 806, 371 N. Y. S. 2d 1008, affd. 40 N. Y. 2d 605 (1976), the indemnity provision of the contract, requiring a sub-contractor to indemnify the contractor for injuries occasioned by any act or omission of the sub-contractor, was once again interpreted to only require indemnification upon a showing that the subcontractor had been negligent. In *Lopez, supra,* the

plaintiff sued *Consolidated Edison*, who impleaded the plaintiff's employer as a third-party defendant. *Consolidated Edison* was then held liable to the plaintiff for violating Section 200 of the Labor Law by failing to have provided the plaintiff with a safe place to work. In *Lopez, supra*, the third-party defendant employer, who similarly owed the plaintiff the same statutory Section 200 Labor Law duty, was then found not to have been negligent. Based on these findings, in *Lopez, supra*, it was held that the third-party defendant employer was not obligated to indemnify *Consolidated Edison*.

Thus, in both *Barthmare* and *Lopez, supra*, the courts interpreted indemnity provisions of contracts, requiring indemnity for injuries caused by an act or omission of a sub-contractor, only to require indemnity upon a finding that the sub-contractor had been negligent. In the case at bar, the indemnity provisions of the contract do not even call for indemnity by the sub-contractor for injuries caused by the sub-contractor's acts or omissions as in *Barthmare* and *Lopez, supra*, but only call for indemnity for injuries caused by the sub-contractor's negligent acts or omissions. It is therefore clear that the lower court was correct in holding that Collyer could only be required to indemnify Worthman, if Collyer was found to have been negligent.

Worthman, throughout its brief, refers to *Kelly* v. *Diesel, supra*, to show that the New York courts allow a violator of Section 240 of the Labor Law to obtain contractual indemnity from its sub-contractor. Collyer, in no way disputes this proposition of law. However, *Kelly, supra*, does not discuss the language, required to be found in a contract, to trigger the indemnity provision. In fact in *Kelly, supra*, there was no contract of indemnity entered into between the parties and *Kelly, supra*, solely involved apportionment of fault, if any, between the parties and had nothing to do with contractual indemnity.

Though there is no question that Worthman would have the right to contractual indemnity, if the contract between the parties so provided, it is clear that the language of the contract in the case at bar, only gives Worthman contractual indemnity if Collyer was negligent. Worthman, in its brief, no longer seems to even challenge the concept that Collyer is only obligated to indemnify Worthman, if Collyer was negligent. Even the maritime case cited by Worthman at pages 16 and 17 of its brief, *Ryan* v. *Pan Atlantic*, 350 U. S. 124 (1955), requires a finding of negligence in order to compel indemnification. Worthman's brief, however, argues that Collyer was either negligent, as a matter of law, due to Collyer's alleged violation of Section 240 of the Labor Law or that the jury was improperly instructed as to the issue of Collyer's alleged negligence.

It is respectfully submitted, as will be discussed later on in this brief, that neither argument is meritorious and thus the judgment of the court below should be affirmed.

POINT II

The 1969 amendments to Section 240 of the Labor Law place a mandatory duty to provide safe scaffolding, solely on owners and contractors and place no such mandatory duty on the employer subcontractor.

Section 240 of the Labor Law was amended in 1969 so as to impose its mandatory duties on "all contractors and owners and their agents". Worthman contends that the Legislature, by using the term "all contractors" meant to impose the mandatory duties of Section 240 of the Labor Law on sub-contractors, whereas Collyer contends, and the court below so held, that the Legislature did not mean to impose the mandatory duties of Section 240 of the Labor Law on sub-contractors.

Worthman, in Point I of its brief, states that, to understand the issue as to whether Section 240 of the Labor

Law, as amended in 1969, is applicable to sub-contractors, this Court has to refer to pre-1969 law. Worthman does not go back far enough as, in fact, it is not only necessary to look at pre-1969 law, but necessary to look at pre-1962 law to reach a full understanding of the primary issue raised on the appeal herein.

Prior to 1962, Section 240 of the Labor Law imposed its mandatory duties only on those parties "employing or directing" the injured plaintiff, while Section 241 of the Labor Law imposed its mandatory duties on "all contractors and owners". The distinction between the parties obligated under said sections of the Labor Law were discussed and formed the basis of the holdings of numerous New York cases. Under those sections of the Labor Law, as written prior to 1962, the New York courts held that Section 240 of the Labor Law applied to the employer sub-contractor, whereas the phrase "all contractors and owners", used in Section 241 of the Labor Law, only applied to general contractors and owners.*

This distinction between Sections 240 and 241 of the Labor Law prior to 1962 was explained in *Naso* v. *Wates & Company, Inc.*, 21 A. D. 2d 679, 249 N. Y. S. 2d 1009, 1011 (2nd Dept., 1964). The Court stated therein:

> "There is a distinction between duties laid upon 'contractors and owners' under Section 241 of the Labor Law and on a 'person employing or directing another to perform labor' under Section 240 of the Labor Law... Broadly, the distinction is that the general contractor and the owner are responsible for the safe condition of the commonly-used portions of the premises, but that subcontractors are responsible for supplying safety devices in the areas created by and intimately connected with their work..."

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*Said section would presumably also have been applicable to prime contractors when the owner acted as his own general contractor.

(See also *Conte* v. *Large Scale Development Corp.*, 10 N. Y. 2d 20, 1961, and *Wright* v. *Belt Associates, Inc.*, 14 N. Y. 2d 129, 1964.)

In *Wetteland* v. *Renya Construction Co.*, 42 Misc. 2d 991, 249 N. Y. S. 2d 593, 601 (Sup. Kings, 1963), affd. 23 A. D. 2d 822, 258 N. Y. S. 2d 817 (2nd Dept., 1965), a complaint against an engineer retained by the owner, which complaint was based in part on Section 241 of the Labor Law, was dismissed with the lower court stating:

> "As for any statutory duty... there is none. This defendant was neither an owner nor contractor within the scope of Section 241. The 'contractor' contemplated by this section is the general contractor..."

Thus, prior to 1962, the very phrase in question in the case at bar, "all contractors and owners", was interpreted by the courts to mean that the contractor contemplated by such phrase was only the general contractor. This was precisely the holding of the court below in the case at bar.

In any event, in 1962, Sections 240 and 241 of the Labor Law were both amended. Those parties, having a mandatory duty under Section 240 of the Labor Law were not changed and remained the employer sub-contractor. However, sub-contractors were added as parties having mandatory duties under Section 241 of the Labor Law. The Legislature, in 1962, obviously recognizing the fact that the phrase "all contractors and owners" was not meant to include sub-contractors amended the statute to then impose the mandatory duties of the statute on "owners, contractors and sub-contractors".

From 1962 to 1969, Section 240 of the Labor Law thus applied to employer sub-contractors, whereas Section

241 of the Labor Law applied to owners, general contractors and sub-contractors. In 1969, the Legislature determined that the mandatory duties of Sections 240 and 241 of the Labor Law should apply to the same parties and amended both sections of the Labor Law so that the sections would apply only to "all contractors and owners and their agents". The Legislature specifically deleted the phrase those "employing and directing" from Section 240 of the Labor Law and specifically deleted the term "sub-contractors" from Section 241 of the Labor Law. It is thus obvious that in 1969 the Legislature only wanted the mandatory duties of Sections 240 and 241 of the Labor Law to apply to owners and general contractors (and their agents) and no longer wanted the mandatory duties of either section of the Labor Law to apply to sub-contractors. If the Legislature wanted to keep the mandatory duties of Sections 240 and 241 of the Labor Law applicable to sub-contractors, the Legislature would obviously not have deleted the phrase "employing and directing" from Section 240 of the Labor Law and would not have deleted the term "sub-contractors" from Section 241 of the Labor Law, which term "sub-contractors" had just been added to Section 241 of the Labor Law in 1962.

The Legislative history, which accompanied the 1969 amendments to Sections 240 and 241 of the Labor Law,* also makes it clear that the Legislature did not intend to have either section of the Labor Law apply to sub-contractors. The memorandum of Senator Calandra and Assemblyman Amann pertaining to the 1969 amendments to Sections 240 and 241 of the Labor Law, reads as follows:

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* Legislative history to 1969 amendments to Sections 240 and 241 of the Labor Law are appended at end of this brief.

"This bill places ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.

"The Labor Law was enacted for the sole purpose of protecting workmen. The courts have consistently held that the owner and general contractor have a non-delegable duty to provide a safe place to work for all workmen on the job. The owner and general contractor have the prime contract and interest in completing the work. They choose the subcontractors and coordinate the work and, in addition, have overall supervision of all the work. They are primarily responsible for the erection of the building.

"However, under the present interpretation of the law a subcontractor, because he is named in Sections 240 and 241 and even though his concern with the construction project may be quite limited, can relieve the owner or general contractor of liability for safe work practices merely by securing the basic workmen's compensation coverage.

"Under the present sections an owner and/or contractor would be inclined to choose a subcontractor predicated on price, disregarding the subcontractor's safety measures. This, of course, is dangerous to the welfare and health of the men working on the project and would defeat the original intent of the Labor Law.

"The owner and general contractor can protect themselves against liability caused by the subcontractor's carelessness by a contractual indemnification agreement which is commonplace. In other words, the owner or general contractor would have an undelegable duty to the workmen and could be indemnified contractually by the subcontractor for any violation that the subcontractor may cause.

"The bill restores to the owner and general contractor the responsibility where it properly belongs, in their selection of subcontractors and in the progress of the work in regard to the safety of all men on the job. Under the present Sections 240 and 241 of the Labor Law, the non-delegable duty has shifted from the general contractor and owner to the subcontractor, making him responsible for many things that he has no control of, such as coordination and overall supervision of the work. Thus, often a subcontractor is chosen whose bid for the job is the lowest, regardless of safety measures.

"In order to accomplish liability upon the owner and contractor and to specifically provide a greater measure of safety for workers, Section 241, which was eliminated in 1962, is reinstated by this bill. The reinstatement imposes the duty and liability upon the general contractor and owner to plank over every second floor so that workmen will not be exposed to working in open areas. The present, general wording of the section has had the dangerous, and sometimes fatal, result that structural workmen have been required to work on open floors without any planking protection below.

"These laws were supposed to be enacted specifically for the protection of these workers."

The aforesaid memorandum makes it clear that the Legislature uses the terms "contractor" and "general contractor" synonymously, while distinguishing the term sub-contractor from the term contractor. The aforesaid memorandum also makes it clear that the Legislature, in the 1969 amendments to Sections 240 and 241 of the Labor Law, was intentionally using the language previously used in Section 241 of the Labor Law in effect prior to 1962. The pre-1962 language of section 241 of the Labor Law was language generally accepted to

refer only to owners and general contractors and was the language used prior to the time that the Legislature, in 1962, specifically added sub-contractors as parties having mandatory duties under Section 241 of the Labor Law, which term "sub-contractors", as aforestated, was deleted from section 241 of the Labor Law in 1969.

It is further to be noted that, not only does the Legislature use the terms "general contractor" and "Contractor" synonymously, as distinguished from sub-contractors, but so does the construction industry. The contract involved in the case at bar is the standard form of contract used in 1972 by the American Institute of Architects (121a). In this contract, as in the Labor Law, the term "contractor" is used to describe the general contractor, whereas Collyer is described as the sub-contractor.

Furthermore, the memorandum of the State AFL-CIO pertaining to the same amendments to Sections 240 and 241 of the Labor Law reads in pertinent part as follows:

> "Another change is made by removing the present reference to a subcontractor as one having direct responsibility for safety practices and limiting such responsibility to the owner and general contractor as was the case before the 1962 amendments. The intent of the 1962 changes was to expand the class of those liable for safety violations. Instead, experience has shown a decrease in safe practices, confusion and attempted shifting of responsibility and liability between general contractor and subcontractor. This bill, therefore, returns the safety responsibility to where it belongs—owners and contractors..."

Thus, the aforesaid State ALF-CIO memorandum also makes it clear that the mandatory duties of Sections 240 and 241 of the Labor Law in 1969 were being *'limited'* (our emphasis) to the owner and general contractor and

that experience had shown that adding mandatory Labor Law duties in 1962 to sub-contractors, in addition to the mandatory Labor Law duties already imposed upon owners and general contractors had in no way added to safety but, in fact, had only created confusion.

The Legislature, in 1969, by limiting mandatory duties under both Sections 240 and 241 of the Labor Law to owners and contractors and deleting sub-contractors from such responsibility, was attempting to avoid confusion of responsibility and was attempting to promote safety for the men working in the construction industry. The Legislature, in 1969, was returning to a statutory scheme to promote safety in the construction industry as it had under the Labor Law prior to 1962, by avoiding any dual responsibility between general contractors and sub-contractors under either Section 240 or 241 of the Labor Law. Prior to 1962, only subcontractors had mandatory duties under Section 240 of the Labor Law, while only general contractors had mandatory duties under Section 241 of the Labor Law. In 1969, the Legislature, in addition to avoiding dual responsibility between general contractors and sub-contractors under said sections also decided to impose mandatory duties solely on the general contractor under both Sections 240 and 241 of the Labor Law.

The New York Court of Appeals, in discussing the pre-1962 Labor Law, specifically recognized the fact that the Legislative scheme, to promote safety in the construction industry, was to avoid dual responsibility between general contractors and subcontractors under Sections 240 and 241 of the Labor Law. The Court of Appeals stated in *Wright* v. *Belt*, *supra.*, at page 136 thereof, in referring to the pre-1962 Labor Law:

> "...Whatever additional protection seemingly might be afforded workmen by the imposition of dual responsibility for the assurance of safety precautions

> is not reflected in the statutory scheme enacted by the Legislature. The policy rather has been to protect employees on the job by avoiding confusion and division of authority. Uncertainty regarding the division of responsibility for safety precautions by the subcontractors and general contractors not only produces litigation over accidents that have happened, but is probably a prime cause of their happening in the first place."

(See also *Conte* v. *Large Scale Development Corp.*, *supra.*)

Worthman, in discussing the State AFL-CIO report, emphasizes on Page 11 of its brief, that nowhere does said report contain language of exculpation of sub-contractors, but only contains language of inculpation of owners and general contractors. Worthman apparently overlooked the language in the report which reads in part:

> "Another change is made by removing the present reference to subcontractor as one having direct responsibility for safety practices and *limiting* such responsibility to the owner and general contractor as was the case before the 1962 amendments..." (our emphasis).

Judge Dooling, in his decision, discusses the various amendments of Sections 240 and 241 of the Labor Law, as well as discussing the Legislative history accompanying the 1969 amendments. In addition, Judge Dooling also points out that there are different sections of the Labor Law which specifically impose mandatory duties on subcontractors, but points out that those sections, while imposing such duties on sub-contractors, specifically refer to the term "sub-contractors", which term "sub-contractors", as aforestated, was specifically deleted from Sections 240 and 241 of the Labor Law by the 1969 amendments to same (25a).

It is obvious from reading the language of Sections 240 and 241 of the Labor Law from 1962 to date and

reading the Legislative history to the 1969 amendments to said sections, that the Legislature did not delete the term "sub-contractors" in 1969 by mistake or inability to properly draft an amendment, as argued by Worthman. The Labor Law was amended in 1969 to put the responsibility where it belonged and to limit the responsibility to owners and general contractors so as to avoid confusion and, by doing so, to give greater safety to those working in the construction industry. It is thus respectfully submitted that Judge Dooling was correct in holding that Section 240 of the Labor Law was not applicable to Collyer in the case at bar.

POINT III

Worthman's contention, that the 1969 amendments to Section 240 of the Labor Law meant to place mandatory duties on sub-contractors, so as to give greater financial protection to injured workmen, is not supported by the language of the amendment, the legislative history to the amendment, any cases or common sense.

Though the entire Legislative history to the 1969 amendments to the Labor Law refers to safety and safety practices, Worthman argues in Point I of its brief that the purpose of the amendments was not one of safety, but rather one of giving greater financial protection to workmen after they were injured. Worthman spends pages in its brief discussing cases decided under the Labor Law prior to 1969, but nowhere shows how any of the cited cases relate to the interpretation of the language used in the 1969 amendments to the Labor Law or shed any light on the purpose of the 1969 amendments to the Labor Law.

In passing, it could be stated that *Wohlfron* v. *Brooklyn Edison Co., Inc.*, 238 App. Div. 463, 265 N. Y. Supp. 18, affd. 263 N. Y. 547 (1933), cited by Worthman, at page 8 of its brief, for certain propositions of law relating to

Section 240 of the Labor Law, is not even a Section 240 Labor Law case and that *Sarnoff* v. *Charles Schad, Inc.*, 22 N. Y. 2d 180 (1968), cited on page 9 of Worthman's brief for the proposition that a general contractor could avoid Section 240 Labor Law liabilities by having subcontractors supply scaffolds, was decided in just the opposite manner. To further discuss the cases cited by Worthman relating to the Labor Law prior to 1969 would in no way aid this Court for the reason, as aforestated, that all such cited cases by Worthman are irrelevant to the issues raised in the case at bar.

Worthman, on page 11 of its brief, contends that Judge Dooling acted improperly by determining the meaning of the 1969 amendments to the Labor Law through a literal reading of the amendments. Worthman, thus, apparently admits that the term "all contractors" literally read, does not include therein the term "subcontractors". Worthman argues and emphasizes, on page 11 of its brief, that the Legislative report must be read in the context of what the drafters were attempting to accomplish at the time. Collyer does not disagree with such argument. The drafters, as aforestated, were attempting to create further safety in the construction industry by limiting responsibility under Sections 240 and 241 of the Labor Law to owners and general contractors and, thus, avoiding confusion as to whether a general contractor or a subcontractor would have the responsibility to perform the duty mandated by the Sections.

Nowhere, except in Worthman's brief and imagination, was there ever any suggestion that the 1969 amendments to Sections 240 and 241 of the Labor Law were being made for the purpose of giving an injured worker greater financial protection after his injury occurred, by increasing the number of parties the worker could sue. Furthermore, by retaining sub-contractors as well as contractors, as parties responsible under the aforesaid sections of the Labor Law, would not in reality normally give an injured

workman an additional party to sue. The sub-contractor is inevitably also the injured workman's employer and protected by Workmen's Compensation insurance which factor Worthman even recognizes on page 8 of its brief. Thus, by accepting Worthman's argument, one would have to conclude that the Legislature, by including sub-contractors under the coverage of Sections 240 and 241 of the Labor Law, would be decreasing safety by adding confusion as to which party had the statutory responsibility under the sections, while not in any practical way affording the injured worker any additional financial protection. This was obviously not the intent of the Legislature.

POINT IV

The cases cited by Worthman, relating to the Labor Law after 1969, also do not support Worthman's contention that the 1969 amendments to the Labor Law meant to place mandatory duties on sub-contractors.

Worthman, in an attempt to bolster its argument, cites two cases interpreting Section 240 of the Labor Law after the 1969 amendments. These cases are *Rocha, supra*, and *Carinha* v. *Action Crane Corp., supra.* Neither of these cases aid Worthman's argument, and it is respectfully submitted that, if anything, *Rocha, supra*, is supportive of Collyer's position herein.

In *Rocha, supra*, it was held that, since 1969, an owner has mandatory duties under Section 240 of the Labor Law. *Rocha, supra*, in no way involved sub-contractors. However, the language of the decision in *Rocha, supra*, indicates that the amended Section 240 of the Labor Law concerned itself with owners and general contractors, rather than with sub-contractors. The Appellate Division in *Rocha, supra*, stated at 360 N. Y. S. 2d 487, 488:

> ". . . A study of the cases analyzing various sections of Article 10 of the Labor Law compels us to con-

clude that it was the intent of the Legislature, in amending section 240 of the Labor Law, to impose a nodelegable duty on an owner, as such, in order to bring that section into line with sections 241 and 241-a where such duty already existed . . .

"This conclusion is further bolstered when we consider the legislative history of the 1969 amendment by examining the memorandum submitted by the bill's authors (1969 N.Y. Legis. Annual, pp. 407-408). It specifically states that the purpose of the bill was to place the responsibility for safety practices on the owner and general contractor, where it belongs . . .

"In summary, we conclude that the intended result of the 1969 amendment was to place the primary and nondelegable responsibility under Section 240 on the owner and general contractor who have the means of protecting themselves financially and otherwise by agreements with those they hire . . ."

Worthman, rather than accepting the language of *Rocha, supra*, for that which it apparently stands; to wit, liability of general contractors and owners under Section 240 of the Labor Law, as amended in 1969, attempts to base an argument on the use by the Court in *Rocha, supra*, of the phrase "primary responsibility". Worthman argues, on pages 12 through 14 of its brief, that use of this phrase indicates that, in addition to contractors and owners having responsibilities under Section 240 of the Labor Law, sub-contractors also have responsibilities under Section 240 of the Labor Law. Worthman further states, on page 13 of its brief, that *Kelly* v. *Diesel, supra*, also properly defined the contractor's responsibility under Section 240 of the Labor Law, as one of "first instance liability" and argues that, therefore, sub-contractors also have at least a secondary liability under Section 240 of the Labor Law.

However, Worthman has completely interpreted these two cases improperly. *Kelly* v. *Diesel, supra,* in the first place, concerns itself with Section 240 of the Labor Law prior to the 1969 amendments. More important, however, is the fact that, in *Kelly* v. *Diesel, supra,* though the negligent sub-contractor was required to indemnify the contractor, which contractor had been held solely vicariously liable due to a violation of Section 240 of the Labor Law, only the contractor was held to have violated Section 240 of the Labor Law. The sub-contractor, who was not plaintiff's employer in *Kelly* v. *Diesel, supra,* was held liable to the plaintiff only on the theory of common law negligence. Thus, it can be seen that phrases such as "first instance liability" or "primary responsibility" are in no way indicative of the fact that sub-contractors, in addition to contractors, have mandatory duties under Section 240 of the Labor Law. As held in *Kelly* v. *Diesel, supra,* though under certain circumstances, the sub-contractor must indemnify the contractor, such indemnification, if not based on an applicable indemnity agreement, would have to be based on common law principles of negligence and not on absolute liability imposed by Section 240 of the Labor Law.

Carinha, supra, also cited by Worthman, does not aid Worthman in its argument. In *Carinha, supra,* the only parties held liable under Section 240 of the Labor Law were the owner and general contractor. No issue was raised in *Carinha, supra,* concerning Section 240 of the Labor Law as regards sub-contractors.

In *Carinha, supra,* the sub-contractor, without regard to mandatory duties imposed by Section 240 of the Labor Law, was found negligent, which negligence of the sub-contractor imposed vicarious liability on the owner and contractor under Section 240 of the Labor Law. The owner and contractor in *Carinha, supra,* were held solely vicariously liable, since the jury specifically found that the owner and contractor were not liable to the plaintiffs

due to common law negligence. Under such a fact pattern, the Appellate Division granted common law indemnity to the owner and contractor from the sub-contractor and contractual indemnity to the contractor from the sub-contractor.

Such resulting indemnity in *Carinha, supra,* could hardly be questioned. *Kelly* v. *Diesel, supra,* made it clear that, under such a fact pattern, the sub-contractor would have to indemnify the contractor under common law principles of indemnity and the all encompassing indemnity agreement* made it clear that the sub-contractor would also have to contractually indemnify the contractor. The sub-contractor's obligation of indemnity was so clear that this writer, representing the sub-contractor in *Carinha, supra,* conceded, both at the trial level and at the Appellate Division level, that under such a fact pattern, the sub-contractor would have to indemnify both the owner and the contractor.

The fact pattern in *Carinha, supra,* however, is completely different from the fact pattern in the case at bar. In *Carinha, supra,* the sub-contractor negligently created the condition which caused the accident, while the owner and contractor had nothing whatsoever to do with the creation of said condition. In the case at bar, the contractor created the condition which caused the accident, while the sub-contractor had nothing whatsoever to do with the creation of said condition, and the sub-contractor was specifically found free from negligence by the jury. Thus, in the case at bar, the contractor was not held to be vicariously liable under Section 240 of the Labor Law due to any act of the sub-contractor but rather, as distinguished from *Carinha, supra,* was held liable under Section 240 of the Labor Law due to the contractor's own acts.

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*Indemnity agreement between sub-contractor and contractor in *Carinha,* supra, is found on pages 75 and 76 of the Record on Appeal in *Carinha, supra.*

It is thus respectfully submitted that there is nothing in the holding or dicta of the cases relating to the Labor Law after 1969, cited by Worthman, which in any way aids Worthman's argument.

POINT V

Assuming *arguendo* that the 1969 amendments to Section 240 of the Labor Law place a mandatory duty on sub-contractors to provide safe scaffolding for their employees, under the facts in the case at bar and pursuant to the language of the indemnity agreement in the case at bar, Collyer should still not be required to indemnify the contractor.

As discussed in Point I of this brief, for Collyer to have been obligated to indemnify the contractor, Collyer would have had to have been negligent. Since the jury found that Collyer had not been negligent, no contractual indemnity should be imposed upon Collyer. However, Worthman contends that, if Collyer breached a mandatory duty imposed upon it by the 1969 amendments to Section 240 of the Labor Law, Collyer must be deemed negligent, and that such deemed negligence would be sufficient to trigger the indemnity agreement between Collyer and Worthman, even though the breach of the statutory duty came about without a lack of due care and without actual fault on the part of Collyer.

As discussed in Points II through IV of this brief, there was no such mandatory duty imposed upon sub-contractors under the 1969 amendments to Section 240 of the Labor Law. If this Court agrees with Collyer's prior contentions in this brief, this point of the brief becomes moot. However, assuming arguendo that this Court disagrees with Judge Dooling and Collyer's contentions, previously set forth in this brief, and that this Court holds that Collyer breached a mandatory duty to provide safe scaffolding for its employees under the 1969

amendments to Section 240 of the Labor Law, then it is respectfully submitted that, under the facts in the case at bar and pursuant to the language of the indemnity agreement in the case at bar, Collyer should still not be required to indemnify Worthman.

The law is clear in New York that Collyer can only be required to indemnify Worthman, under the facts in the case at bar, if it was the intent of the parties and said intent was properly set forth in the contract between the parties (*Kurek* v. *Portchester Housing Authority*, 18 N. Y. 2d 450, 1966). A party seeking contractual indemnity must show that the provisions of the indemnity agreement express an unmistakable intent to indemnify (*Levine* v. *Shell Oil Co.*, 28 N. Y. 2d 205, 1971; *Margolin* v. *New York Life Insurance Company*, 32 N. Y. 2d 149, 1973; *Polatschek* v. *The City of New York*, 39 A. D. 2d 584, 331 N. Y. S. 2d 966, app. dismissed 33 N. Y. 2d 795 [1973]). This remains the guideline for contractual indemnity, whether the indemnitee's liability to the plaintiff is based on negligence or on absolute or strict liability (*Doundoulakis* v. *Town of Hempstead*, 51 A. D. 2d 302, 381 N. Y. S. 2d 287, 2nd Dept., 1976, reversed other grounds —— N. Y. 2d ——, September 9, 1977).

The law is also clear in New York that a party can be held vicariously liable under Section 240 of the Labor Law through the sole fault of another party (*Kelly* v. *Diesel*, *supra*), since Section 240 of the Labor Law imposes liability without regard to actual fault and without regard to lack of due care or negligence.

In this regard, it is interesting to note, that the Court of Appeals, at page 3, in *Kelly* v. *Diesel*, *supra*, when referring to the contractor violator of Section 240 of the Labor Law and the sub-contractor whose actual fault caused the violation and the accident, only uses the word negligence in relation to the sub-contractor whose fault caused the accident. The fact that negligence has nothing to do with liability imposed under Section 240 of the

Labor Law was made patently clear in *Koenig* v. *Patrick Constr. Corporation*, 298 N. Y. 313 (1948) where the New York Court of Appeals, in discussing Section 240 of the Labor Law, stated at pages 318 and 319:

> "...This the language of the section makes crystal clear: the employer or one directing the work '*shall furnish*' or cause to be furnished equipment or devices... For breach of that duty, thus absolutely imposed, the wrongdoer is rendered liable without regard to his care or lack of it . . ."
>
> ". . . Here, to recapitulate, we have an action based upon a statute whose cardinal purpose was to protect plaintiff and others in his calling, without reference to questions of negligence..."

It must be conceded that, even though, the New York cases have constantly held that violations of Section 240 of the Labor Law have absolutely nothing to do with lack of due care, cases have also held that a violator of Section 240 of the Labor Law was to be deemed an actively negligent party (*Major* v. *Waverly & Ogden, Inc.*, 7 N. Y. 2d 322, 1960, and *Joyce* v. *Rumsey Realty Corp.*, 17 N. Y. 2d 118, 1966).

The reason the court deemed a Section 240 Labor Law violator actively negligent, was to prevent the statutory violator from obtaining common law indemnity and to bar the defense of contributory negligence, so as to avoid vitiating the purpose of the statute. However, the New York law has changed, by statute from contributory negligence to comparative negligence * and in fact the New York courts no longer even recognize the theory of active negligence (*Dole* v. *Dow Chem Co.*, 30 N. Y. 2d 143, 1972, *Kelly* v. *Diesel, supra*).

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*No case, to this writer's knowledge has yet decided whether comparative negligence will be applicable in Section 240 Labor Law cases, though contributory negligence had not been a bar to recovery.

In any event, the cases, which deemed a Section 240 Labor Law violator actively negligent, though such violation had come about without regard to principles of negligence, were not cases attempting to interpret the meaning of the word negligence, as used in an indemnity agreement. Assuming arguendo, that Section 240 of the Labor Law was applicable to Collyer in the case at bar, this Court would still have to determine whether the use of the word negligence, in the indemnity agreement in the case at bar, expressed an unmistakable intent to have Collyer indemnify Worthman, even though Collyer had fulfilled all its obligations under the contract, had no way been at fault in causing the accident and had specifically been found by the jury not to have been negligent.

If it was the intent of the parties, to have Collyer indemnify Worthman for injuries occurring to Collyer's employees from the performance of the work on the project, under any fact pattern, then the indemnity agreement should have clearly so stated, with language used in numerous indemnity agreements, such as the language used in the indemnity agreement involved in *Bignami* v. *Caristo Construction Corp.*, 42 A. D. 2d 600, 345 N. Y. S. 2d 103 (2nd Dept., 1973).

If it was the intent of the parties to have Collyer indemnify Worthman for damages caused by Worthman's own affirmative violation of Section 240 of the Labor Law, wherein Worthman created an unsafe scaffold and invited Collyer's employees to use it, then the indemnity agreement should have clearly so stated, with language used in numerous indemnity agreements, such as the language used in the indemnity agreement involved in the *Carinha* case, *supra.*

However, the parties in the case at bar did not use such language in the indemnity agreement herein. The best that can be said for Worthman's position, is that if Collyer were to be deemed negligent due to a violation of

Section 240 of the Labor Law, which violation was created by Worthman, without any lack of due care on Collyer's part, the indemnity agreement is ambiguous, whether under such circumstances, Collyer is compelled to indemnify Worthman. Once an indemnity agreement is ambiguous, as concerns the obligation to indemnify, the courts must deny indemnity to the party seeking same (*Redding* v. *Gulf Oil Corporation*, 38 A. D. 2d 850, 330 N. Y. S. 2d 158, 2nd Dept., 1972).

It is respectfully submitted that the indemnity agreement in the case at bar, only intended to have Collyer indemnify Worthman if an accident occurred, which accident was caused, at least in part, due to a lack of due care on Collyer's part. Thus, in any event, under the facts in the case at bar, Collyer should not be compelled to contractually indemnify Worthman.

An analogous type of issue was raised in *Doundoulakis* v. *Town of Hempstead, supra.* In *Doundoulakis, supra,* Gahagan, a dredging contractor, retained to hydraulically fill land, had agreed to assume all responsibility for the work, take all precautions for the prevention of injuries to property in or about the work, bear all losses on account of the character of the work, assume all damages arising out of the nature of the work and indemnify the Town of Hempstead for any claims for damages to property sustained by or from the dredgor in doing the work. In order to hydraulically fill the land in question, the dredgor pumped water into the fill site, which water seeped into neighboring property and caused damages to the neighboring property. The Appellate Division, in *Doundoulakis, supra,* held the Town of Hempstead, the dredgor Gahagan and the design engineer all strictly liable to the plaintiffs for the property damages which occurred due to the aforesaid seepage of water. However, the Appellate Division would not grant the Town of Hempstead

contractual indemnity from the dredgor, stating at 381 N. Y. S. 2d 295*:

> "In our opinion, Gahagan cannot and should not be impaled upon contractual indemnity provisions which cannot be fairly read or construed to impose (and certainly do not express the 'unmistakabe intent' to impose) liability upon it for the planning and design concepts of the Town and DeBruin, particularly concepts which result in the imposition of strict liability, i. e. liability not for negligence, but merely for engaging in the act and causing damage..."

It is respectfully submitted that in the case at bar, as in *Doundoulakis, supra*, Collyer, under the ambiguous applicability of the language of the indemnity agreement to the facts in the case at bar, should not be compelled to indemnify Worthman, since Worthman, solely through its own acts, created and provided the unsafe scaffolding. Thus, the judgment of the court below should be affirmed.

POINT VI

Reversible error is non-existent in the charge to the jury concerning the third-party action.

The only issue the jury had to decide, as concerns the third-party action, was whether or not Collyer was negligent in failing to provide safe scaffolding for its employees working on the canopy fascia. This precise question was posed to the jury by the Court below and answered by the jury in the negative (120a).

As a guide, to determine whether Collyer had been negligent in that manner, the Court below charged the jury in part as follows:

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* The New York Court of Appeals reversed a plaintiffs' judgment and ordered a new trial, holding that a determination on the issue of contractual indemnity would have to await what the proof on the retrial revealed.

"As between Worthman and Collyer, Worthman must show that a negligent act or a negligent omission of Collyer or one of its employees was, in whole or in part, a cause of plaintiff's accident... (37a).

"Collyer undertook in its contract to hold Worthman harmless from all damages, claims and costs arising out of such accidents if and only if the accidents were due in whole or part to negligent (sic) or omission on Collyer's part. In this respect, Collyer owed to its employees the duty to provide them with a safe place to work, and that would include providing proper scaffolding where needed to do the work. Collyer, acting through plaintiff and Falasca and their superiors, was under a duty to plaintiff to see to it that any necessary scaffolding was on the job and in use for the canopy part of the job whether provided by Worthman or Collyer itself. If, therefore you find from the evidence that adequately safe scaffolding or other means of safely installing the fascia were not provided, and that was known to Collyer through the knowledge of its employees, including plaintiff, or should have been known to it, then that would constitute negligence or a negligent omission on Collyer's part and you must then find for Worthman on its claim over against Collyer" (37a, 38a).

A reading of the entire charge, including that not limited to the portion referred to above, completely refutes Worthman's arguments that the court below did not permit the jury to determine that Collyer had been negligent through a negligent omission or did not explain to the jury the term safe place to work as it was applicable to the facts in the case at bar. It is respectfully submitted that the court below presented the issue to be decided by the jury in a precise accurate manner, which not only was free from prejudicial error, but would have been difficult to improve upon.

Worthman also contends that the charge was improper, since the charge allegedly did not relate the facts in the case at bar to the applicable principles of law. In the first instance, the Court below did relate the facts in the case at bar to the applicable principles of law, by telling the jury that Collyer's contract required Collyer to provide its own scaffolding for its own work, but also allowed Collyer to instead use the contractor's scaffolding, with the premission of the contractor and then by telling the jury that whether Collyer or the contractor provided the scaffolding, it was still Collyer's duty to see to it that safe scaffolding was provided for its employees (37a, 38a). Thus, the jury simply had to decide whether Collyer had been negligent in failing to provide safe scaffolding, which as aforestated the jury decided in the negative.

In the second instance, the facts pertaining to the third-party action were mostly undisputed and certainly not sufficiently complex to require a more thorough description of the facts in the charge. Under such circumstances, it was not necessary to further relate the facts in the case at bar to the applicable principles of law.

In the third instance, Worthman never requested the Court below to charge the jury in the manner now raised in its brief for the first time, nor did Worthman take any exception to the charge for the alleged failure to relate the facts in the case at bar to the applicable principles of law. Thus, such alleged error should be considered harmless (*Osorio* v. *Stuyvesant Oil Burner Corp.*, 50 A. D. 2d 541, 375 N. Y. S. 2d 332, 1st Dept., motion to appeal denied, 39 N. Y. 2d 705, 1975) and in any event, pursuant to Rule 51 of the Federal Rules of Civil Procedure, Worthman has waived any right to appeal, based on this alleged error in the charge.

Finally Worthman argues that the court below committed prejudicial error by additionally charging the jury that Collyer could not be considered negligent if the risk

was so evident that plaintiff proceeding as he did could not fairly be regarded as acting in the course of his employment. This portion of the charge should also not be the basis for prejudicial error.

The court charged the jury that though Collyer did not have a mandatory duty to provide safe scaffolding under Section 240 of the Labor Law, Collyer still owed the plaintiff a duty to provide a safe place for plaintiff to work, which would include using reasonable care in providing or seeing to it that the plaintiff had safe scaffolding upon which to work. However, the duty to provide a safe place to work has always been defined under New York law to only protect employees from hidden dangers, for example in *Wohlfron* v. *Brooklyn Edison Co., Inc., supra,* the Court stated at 265 N. Y. supp. 20, 21.

> "...The rule in this state and in many other jurisdictions is that the duty rests on the owner or general contractor to use ordinary care to keep the premises in a reasonably safe condition for the servants of the contractor or subcontractor, particularly where the work is of a dangerous character; and to see to it that the workmen have reasonable protection against the consequences of hidden dangers known to the owner or general contractor or which ought to have been known by him, and not known to those engaged in the particular work."

In *McLean* v. *Studebaker Bros. Co.*, 221 N. Y. 475, 478 (1917), the court stated:

> "...No duty rests on a master to secure the safety of his servant against a condition, or even defects, risks or dangers that may be readily observable by the reasonable use of the senses, having in view the age, intelligence and experience of the servant."

More recently, in *Gasper* v. *Ford Motor Company*, 13 N. Y. 2d 104, 110 (1963), the court made this very clear by stating:

> "At common law an employer had a duty to provide his employees with a safe place to work... Section 200 of the Labor Law codified and extended this duty by placing upon the owner of a building a similar obligation concerning defects in the plant for the purpose for which the plant is used... The duty however is subject to recognized exceptions. It does not extend to hazards which are part or inherent in the very work which the contractor is to perform... Nor does any duty rest upon an owner 'to secure the safety of his servant against a condition, or even defects, risks or dangers that may be readily observable by the reasonable use of the senses, having in view the age, intelligence and experience of the servant'."

The court below, in charging in the manner to which appellant now complains, as referred to above, in fact was anticipating a modification of the New York law in regards to its well established law of limiting the safe place to work doctrine to hidden dangers and the court below by so doing helped, rather than hurt Worthman, in its charge. Under such circumstances Worthman can not complain about that portion of the charge. This is especially so, since Worthman never requested a charge that Collyer owed Worthman a separate duty over and above the duty owed to the plaintiff, never excepted to the failure to receive such a charge and in any event was not entitled to such a charge, since Worthman itself created and supplied the defective scaffold (*Quigley, supra*).

It is respectfully submitted that the charge correctly presented the issue of facts and law to the jury so that the jury was able to properly determine whether or not Collyer had been negligent in failing to provide safe scaffolding for its employees. No reversal should be based on the charge, since the charge when read as a whole, fairly conveyed to the jury the issues they had to decide and the principles of law applicable thereto (*Jemison* v. *Goodman*, 49 A. D. 2d 1011, 373 N. Y. S. 2d 926, 4th Dept., 1975; *Kelsey* v. *The Port Authority of New York and New Jersey*, 52 A. D. 2d 801, 383 N. Y. S. 2d 347, 1st Dept., 1976). Under the facts in the case at bar and the charge in the case at bar, the jury's verdict should not be disturbed.

CONCLUSION

The judgment should be affirmed.

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APPENDIX

Memorandum of Senator Calandra and Assemblyman Amann

Building construction, safety practices

S. 2091-A, Calandra, et alia Ch. 1108

Labor Law, §240; §241, repeal new. This bill places ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.

The Labor Law was enacted for the sole purpose of protecting workmen. The courts have consistently held that the owner and general contractor have a non-delegable duty to provide a safe place to work for all workmen on the job. The owner and general contractor have the prime contract and interest in completing the work. They choose the subcontractors and coordinate the work and, in addition, have overall supervision of all the work. They are primarily responsible for the erection of the building.

However, under the present interpretation of the law a subcontractor, because he is named in Sections 240 and 241 and even though his concern with the construction project may be quite limited, can relieve the owner or general contractor of liability for safe work practices merely by securing the basic workmen's compensation coverage.

Under the present sections an owner and/or contractor would be inclined to choose a subcontractor predicated on price, disregarding the subcontractor's safety measures. This, of course, is dangerous to the welfare and health of the men working on the project and would defeat the original intent of the Labor Law.

The owner and general contractor can protect themselves against liability caused by the subcontractor's

carelessness by a contractual indemnification agreement which is commonplace. In other words, the owner or general contractor would have an undelegable duty to the workmen and could be indemnified contractually by the subcontractor for any violation that the subcontractor may cause.

The bill restores to the owner and general contractor the responsibility, where it properly belongs, in their selection of subcontractors and in the progress of the work in regard to the safety of all men on the job. Under the present Sections 240 and 241 of the Labor Law, the non-delegable duty has shifted from the general contractor and owner to the subcontractor, making him responsible for many things that he has no control of, such as coordination and overall supervision of the work. Thus, often a subcontractor is chosen whose bid for the job is the lowest, regardless of safety measures.

In order to accomplish liability upon the owner and contractor and to specifically provide a greater measure of safety for workers, Section 241, which was eliminated in 1962,* is reinstated by this bill. The reinstatement imposes the duty and liability upon the general contractor and owner to plank over every second floor so that workmen will not be exposed to working in open areas. The present, general wording of the section has had the dangerous, and sometimes fatal, result that structural workmen have been required to work on open floors without any planking protection below.

These laws were supposed to be enacted specifically for the protection of these workers.

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*See N. Y. S. Legislative Annual, 1962, p. 217.

Memoranda of State AFL-CIO

Building construction, safety practices

Re: above bill Ch. 1108

This bill* restores safety protections to workers in construction, excavation and demolition work. The bill is based upon experience under the standards in the Labor Law since the last amendment to the relevant sections, in 1962, and in enforcing the law and the attendant safety standards and rules.

The bill restores the specific requirements in the law prior to 1962 in regard to planking of floors in open areas. This places no additional burden on employers or contractors inasmuch as exactly the same requirements are contained in Industrial Code Rule 23 and have been so required by the Code since 1962. The reason for the change has been the experience that variances and violations occur with greater frequency from Code rules than from the statute, and that as a result needless injuries and deaths have occurred. Restoration of the statutory requirements will neither expand the Labor Department's jurisdiction nor change the specific requirements which are now in effect. By restating these requirements in the law, there will be a clearer and stronger deterrent to violations.

Another change is made by removing the present reference to a subcontractor as one having direct responsibility for safety practices and limiting such responsibility to the owner and general contractor as was the case before the 1962 amendments. The intent of the 1962 changes was to expand the class of those liable for safety violations. Instead, experience has shown a decrease in

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* Requested by the State AFL-CIO on behalf of the Building Construction Trades, particularly the Structural Ironworkers.

safe practices, confusion and attempted shifting of responsibility and liability between general contractor and subcontractor. This bill, therefore, returns the safety responsibility to where it belongs—owners and contractors. To meet the problem of official notification and personal service of corporations, and to conform with the language in other sections dealing with violations of the Labor Law, agents of owners and contractors are specifically named in the bill.

This bill is an essential safety measure. It makes no change whatever in the present requirements on employers, builders and contractors. It facilitates the Labor Department's enforcement of the law. We most strongly urge prompt enactment of this bill.

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